HQ Air Force Center for Environmental Excellence

Legal Topics

Staff Judge Advocate
HQ AFCEE/JA

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Overview

- Legal Topics
- Transition
- Privatization Support Contractors (PSCs)
- Base Responsibilities

Legal Topics
Background

- Traditional Source Selection - Perceived as Expensive and Slow
- Effort to Introduce reasonable commercial practices
- Evolving/Learning Process

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Legal Topics

Relationship With Government Legal Counsel

- Government Counsel must perform "inherently governmental" tasks
- All transactional documents must be reviewed and approved by Government counsel in advance
- If PSCs require outside legal counsel to for advice to Government, it must be approved by Government in advance
- AFCEE Legal Counsel - central source for answers and "cross-feed"

Legal Topics

What Is "Inherently Governmental?"

Guidance - FAR Part 7

- Inherently governmental functions normally fall into 2 categories: (1) the act of governing, and (2) monetary transactions and entitlements
- Services/functions not considered inherently governmental
  - Evaluation of another contractor's performance
  - Support of acquisition planning
  - Assistance in contract management
  - Technical evaluation of contract proposals
  - Advising source selection boards
  - Voting member of source evaluation board
- Determination made by agency issuing solicitation

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Legal Topics
Inherently Governmental

- **Government cannot contract out its fiduciary or decision making responsibilities**
- **Review of the 14 inherently governmental functions**
  1. **Legal advice to government**
  2. **Decision to approve the draft and final RFP**
  3. **Determination whether a proposal complies with the RFP**
  4. **Decision to amend the RFP**
  5. **Determination to exclude/include offerors from Step 1**
  6. **Determination of adequate pricing competition**
  7. **Clearance approval**

Legal Topics
Inherently Governmental (Cont'd)

- **14 inherently governmental functions (continued)**

8. **Assignment of past performance rating**
9. **Assignment of color codes to mission capability factors**
10. **Assignment of risk assessment rating**
11. **Comparative analysis of offerors**
12. **Integrated assessment for best value**
13. **Decision to select developer proposal to award**
14. **Legal authority to enter into legal binding documents**

Legal Topics
Available Legal Resources

- **Air Force**
  - AFCEE Legal Counsel
  - Installation Staff Judge Advocate
  - Major Command Staff Judge Advocate
  - Air Force Civil Engineer Support Agency (Utilities)
  - SAF/General Counsel
- **Non-Air Force**
  - Attorneys retained by PSC for own purposes
  - Attorneys retained by PSC at Air Force Direction

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Legal Topics

Relationship with Local, State and other Federal Authorities

- Very sensitive area
- Although the PSCs may perceive that contact is solely on their own behalf, they must contact the Program Manager or Contracting Representative in advance of any contact
- Insure that Air Force lawyers review and approve any documents, correspondence, etc. with local, state or other federal agencies

Legal Topics
DoD-Wide Effort

- **High Level of Congressional Interest**
  - **Each Department's Implementation Plan Reviewed by DoD and Congress (Oct 98)**
- **Wide Range of Authorities**
  - **Implementation Varies Among the Services**

Legal Topics

Housing Privatization Authority

- **National Defense Authorization Act for 1996**
  - **10 U.S.C. § § 2871 - 2885**
  - **Wide range of authorities**
  - **Intended to Encourage Experimentation**
  - **These authorities were extended to February 10, 2006 by the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398, Section 2806)**
    - **Agreements entered into prior to that date can be fulfilled**

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Legal Topics

General Authority (10 U.S.C. § 2872)

- Acquisition or Construction by Private Persons of Family Housing Units
- On or near military installations w/i U.S., territories and possessions
- May or may not involve the transfer of Air Force-owned property

Legal Topics
Sources of Housing

- New
  - Build/Lease (10 U.S.C. § 2874)
- Existing
  - Currently AF owned (10 U.S.C. § 2878)
    - "Appropriate" consideration as determined by the Secretary of the Air Force
    - Must have suitable preference for military members
  - Currently privately owned (10 U.S.C. § 2872)

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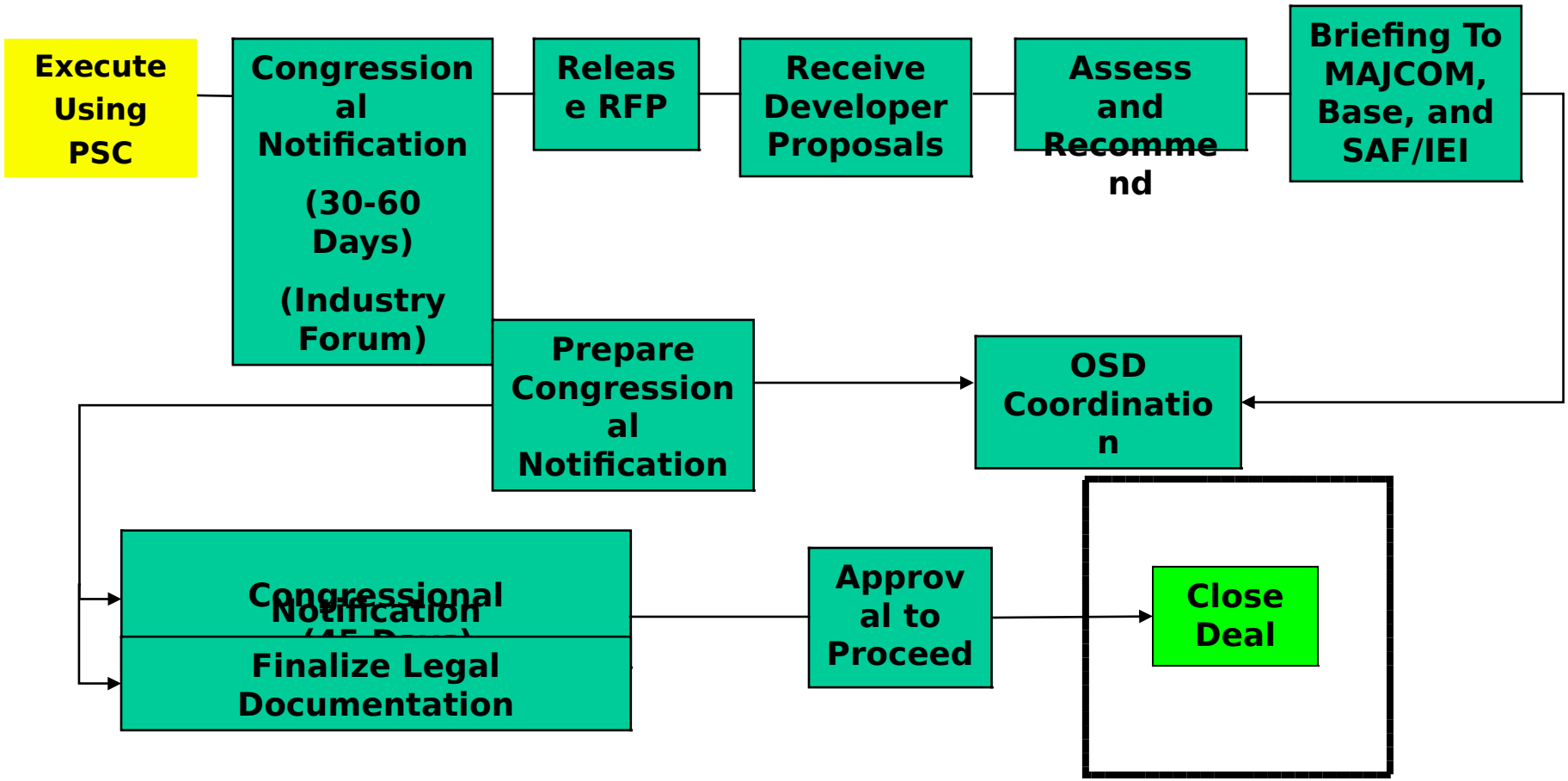
Legal Topics
Document Drafting

- Real Estate Documents
- Financing Documents
- Administration/Management Documents

Legal Topics
Transaction Closing



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Legal Topics
Transaction Closing

- PSCs arrange and manage with Air Force approval
- “Pre-closings” encouraged
- Develop detailed closing checklists
- Insure that all documents as approved by Air Force are fully executed by authorized parties
- Develop detailed disbursement memoranda
- Insure that opinion letters are complete and dated as of closing date
- Insure that documents are recorded by appropriate parties

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Lackland Closing

1 OSD Attorney

2 AF Attorneys

2 Consultants

1 AF Financial Mngr

2 AF Contracting

3 AF Engineers

Legal Topics

Post Closing Transaction Issues

- **Insure that original recorded documents are handled in accordance with Air Force Instructions or, if not specified by Air Force Instructions, by Air Force protocol approved prior to closing**
- **Provide executed and recorded photocopies of closing documents in indexed closing binders (with Table of Contents) as required by particular transaction**
- **Provide Post Closing Guidance to Portfolio Manager and to others associated with administration of the property and enforcement of the documents**

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Transition
Key Milestones

- AF/ILEH secures authority from SAF/FM to obligate funds for scoring
- PSC notifies Successful Offeror and assists the Air Force in resolving administrative details
- Closing team finalizes transactional documents
- AFCEE prepares and submits final OMB Budget Scoring Report to AF/ILE
- SAF/IEI signs the transactional documents
- PSC distributes documents
- Developer records documents
- AF/ILEH transfers Air Force funds to FHIF

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Transition
PSC to PM

- **Transition to Portfolio Management**
  - **PSC responsible for delivering closing documents to AFCEE Portfolio Manager**
  - **PSC to develop and deliver**
    - **Handoff Memo with attachments**
    - **Program Evaluation Plan (PEP)**
- **AFCEE conducts transition conference and reconciles closing activities**
- **Base Management Review Committee (MRC) established**

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Transition

Construction/Renovation/Demolition

- **50%, 95%, and 100% design review conferences typically held to ensure Air Force retains approval of designs**
  - **Opportunity for the developer to show details of their housing designs**
  - **Opportunity for the base and MAJCOM to accept the housing designs**
- **MAJCOM approves final design documents and Notifies Developer to proceed with construction and/or renovation**
- **AFCEE provides developer Air Force's direct loan (if applicable) after construction is complete and accepted**

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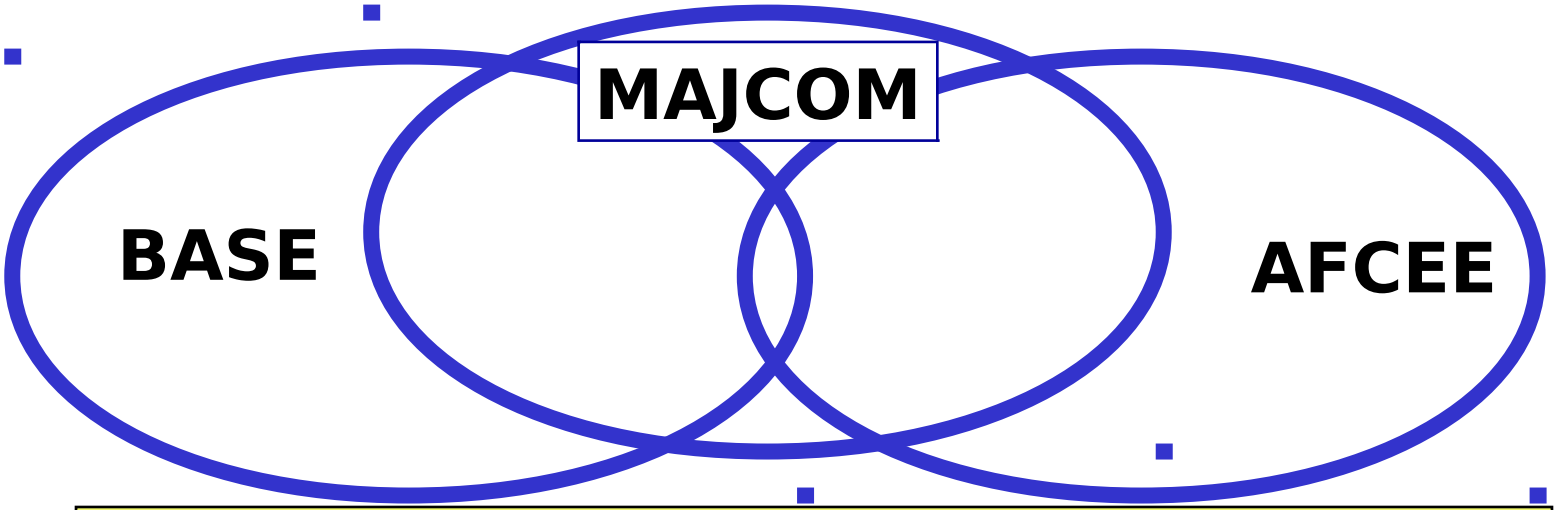
Portfolio Management
Implementation



PROTECT GOVERNMENT'S INTERESTS

- **Improve Quality of Life for Members and Families by:**
  - **Ensure Projects Are Consistent With Commander's Strategic Vision**
  - **Ensure/Improve Financial Viability of the Project**
  - **Protect Government Investment**

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AFCEE Portfolio Management Services

- **AFCEE Support to the Wing Commander and MAJCOM - Provide**
  - **Assistance and support to the MRC**
  - **Financial analysis and recommendations**
  - **Assistance in the preparation of the PEP**
  - **Project trend analysis**
  - **Comparative analysis with other projects**
  - **Interpretation of the transactional documents**
  - **Identification of non-compliance issues**

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MAJCOM and BASE ROLES

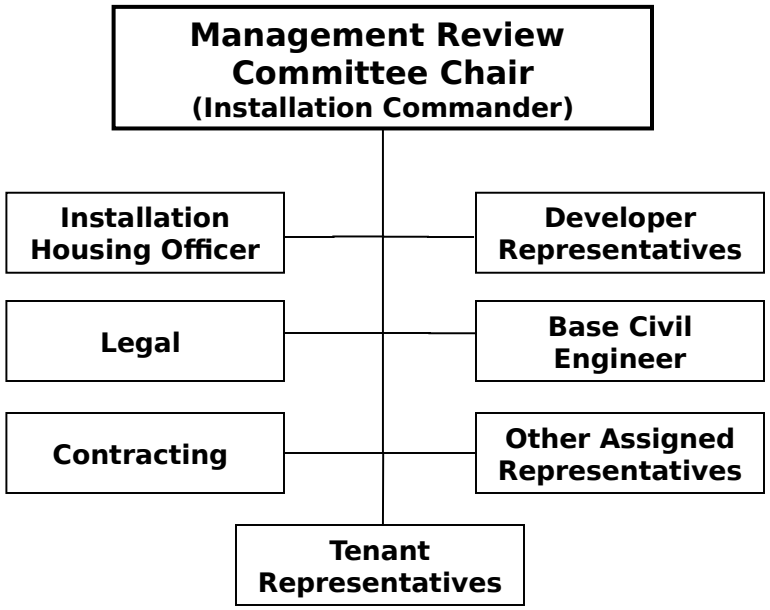
- **MAJCOM Responsibilities**
  Provide project oversight and guidance to the base

- **BASE Responsibilities**
  Provide the day to day oversight and interaction with the developer for the housing privatization project
  - **Chair Management Review Committee (MRC)**
  - **Manage Tenant Referral / Demographics**
  - **Approve Annual Budgets**
  - **Manage Design & Construction Oversight**
  - **Perform Local Compliance Inspections**
  - **Perform Quality Assurance Duties**
  - **Provide Security and Operations Monitoring**
  - **Assess Physical Condition**
  - **Collect and provide portfolio management documents to AFCEE as required**
  - **Conduct Tenant Surveys**

Base Responsibilities

MRC

- Purpose is to resolve post-closure issues and administrative matters including:
  - Routine development operations
  - Tenant relations: quality of service, safety, security
  - Tenant referral issues
  - Capital reinvestment expenditures
- Membership includes the Installation Commander (Chair) and appropriate staff, Project Owner and local property manager, residents' representative



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Base Responsibilities
Project Management Office (PMO)

- The requirements for PMO support (e.g., duration and type of support) will be determined by the installation
  - AF/ILEH will provide funding to support the staffing of the base PMO office
  - PMO staffing may be external civilian overhires or contracted support
- The installation is responsible for establishing, organizing, and maintaining a long-term PMO to:
  - Provide on-site, day-to-day private-sector project management, to include surveillance and oversight of the housing privatization developer/operator
  - Serve as the focal point for all inquiries about the project
  - Directly support the Installation Commander and BCE

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Base Responsibilities
Title II Services

- The MAJCOM and installation will determine if contracted Title II, Quality Assurance Services, are needed
  - Most projects will require the developer to perform all services required for full-time surveillance and inspection during the progress of construction up to the completion and final inspection of the housing privatization project
  - The intent is for a Government-funded inspector to ensure that the houses are built in accordance with the legal documents and the approved design
  - In most cases the developer/property manager will build and maintain the project IAW local building codes

AFCEE Portfolio Management Services

Portfolio Management Defined:

- **Monitor Compliance and Performance**
- **Ensure Financial Compliance**
- **Manage Documents**
- **Prevent/Resolve Problems**

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AFCEE Portfolio Management

Monitor Compliance and Performance

- **Transition Planning – Performed Up to 90 Days Prior to Transaction Closing and 90 Days Post-Closing:**
  - **Approximately 90 days before closing review RFP and requiring documents**
  - **After Congressional Notification (30-60 days) participate in meetings with developer to establish relationships and post-closing roles and responsibilities**
  - **Approximately 45 days before closing receive draft of significant transaction documents and commence system population**
  - **Approximately 15 days before closing receive PSC Hand-Off memo and provide post-closing list of roles and responsibilities to all parties**
  - **At Transaction Closing execute Hand-off and assume Portfolio Management responsibility**
  - **Within 30 days after closing complete review of closing documents and populate Portfolio Management system**
  - **Conduct a site visit within 90 days of closing to verify roles and responsibilities are functioning as planned**

AFCEE Portfolio Management

Monitor Compliance and Performance

- **Compliance Testing – Performed Quarterly:**

  Fundamental mechanism to identify potential project deficiencies

  - **Assess compliance with ground lease, operating agreement, third party loan and government loan/guarantee documents**
  - **Requires customization to each individual project**
  - **Will include statutory or regulatory compliance**
  - **When combined with other portfolio management service this function allows for:**
    - **Proactive engagement with issues not yet at a critical stage**
    - **Assessment of the interrelationship with other transaction items**

AFCEE Portfolio Management

Monitor Compliance and Performance

- **Accounting, Finance and Reporting – Performed Quarterly**
- **Site Visits – Performed Annually:**
  - **Insure that the project is managed and leased in an effective and prudent manner consistent with the goal of improving the quality of life for the member.**
  - **Insure projects are well maintained and in good physical condition**
  - **Reinforce importance of continuous communication between all of the parties involved in the project, including the AFCEE, MAJCOM, portfolio manager, Base, developer, lender and property manager, and residents**

AFCEE Portfolio Management

Monitor Compliance and Performance

- **Insurance Compliance – Performed Annually:**
  - **Review insurance policies for changes in industry standards**
  - **Identify key terms/provisions for future housing privatization projects**
- **Review Title II Inspection Results – Performed Monthly**
  - **Ensure the Air Force is getting project and scope anticipated at transaction closing**

AFCEE Portfolio Management

Manage Documents

- **Document Management – On Going:**
  - **Facilitate Loan Closing**
  - **Receive and organize permanent loan documents at loan closing**
  - **Maintain original or 2nd generation documents at transaction closing, electronically or in secure physical location**
  - **Organize and maintain closing file as defined in the “hand-off” memorandum**
  - **Archive environmental records**

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Recent and Projected Housing Privatization Efforts

- Program Update and Status
- Environmental Issues

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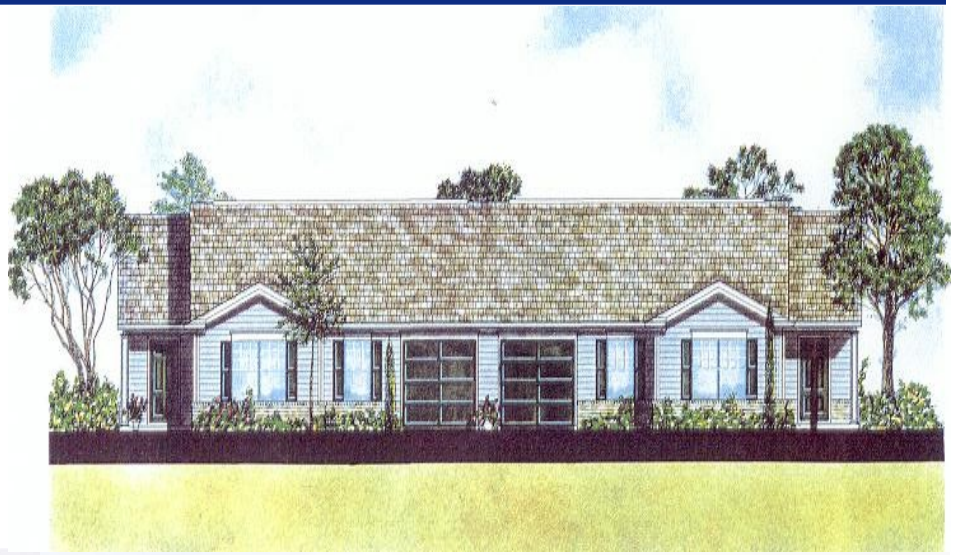
Housing Privatization Project Update

- Pilot Program
- FY01 Program
- FY02 Program
- FY03/04 Program



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Housing Privatization Program Status

Pilot Program	Award	FY01	Award	FY02	
Lackland	Aug 98	Moody	Oct 02	Altus	Langley
Robins	Sep 00	Little Rock	Sep 02	Andrews	McGuire
Dyess	Sep 00	Offutt	Dec 02	Barksdale	Nellis
Elmendorf	Mar 01	Hill	Dec 02	Beale	
Hickam					
Goodfellow	Feb 02			Buckley	Hurlburt
Kirtland	Mar 02			Elmendorf II	
Lackland II					
Patrick	Aug 02				
Wright-Patt	May 02				
Dover	Nov 02				

FY03 - *Cannon, FE Warren, Hanscom, Maxwell, & Shaw

*Cannon accelerated from FY04 in place of Brooks (reqt included in Lackland II)

Total Program: 30 Projects ~ 27,000 homes

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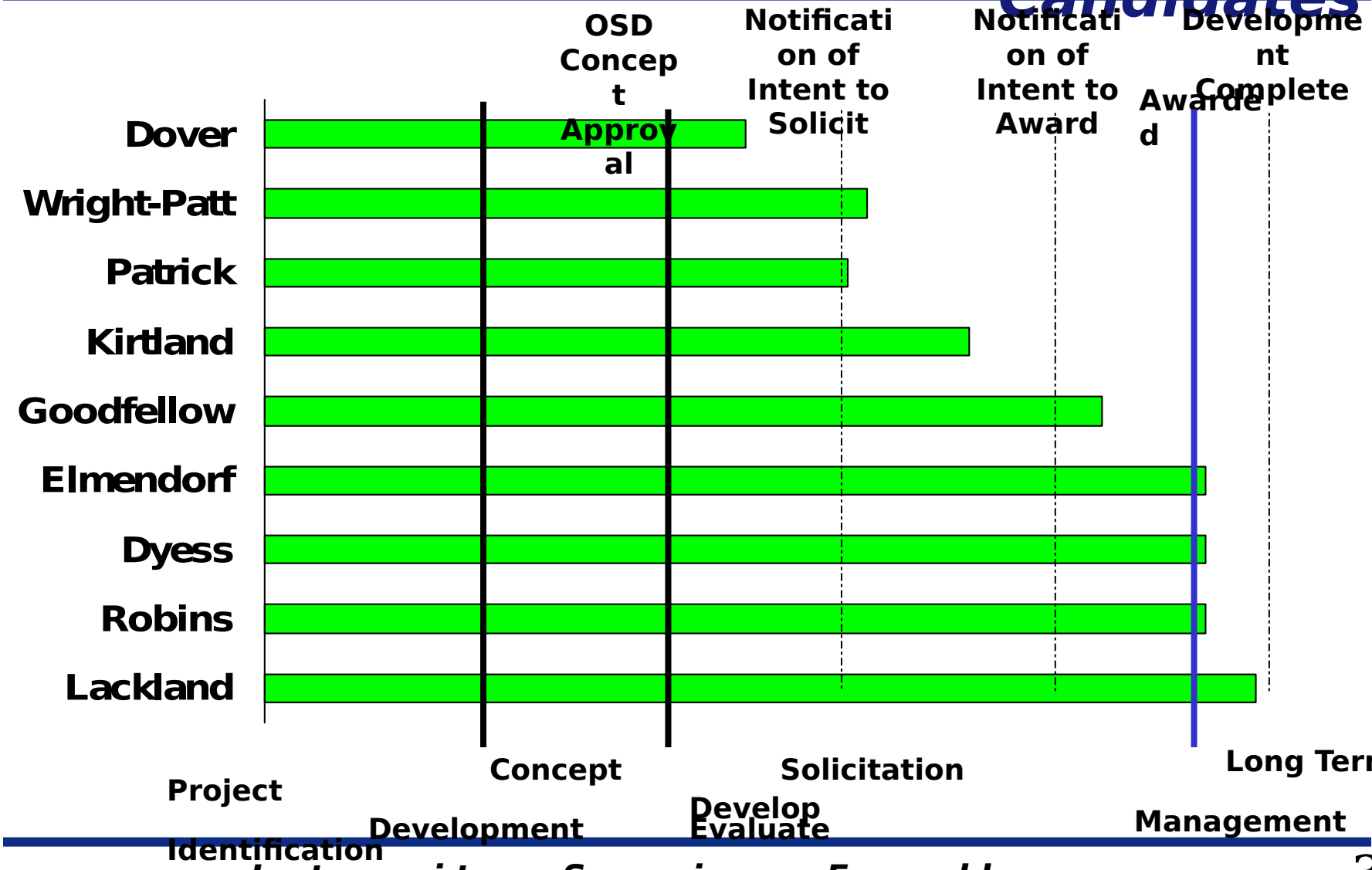
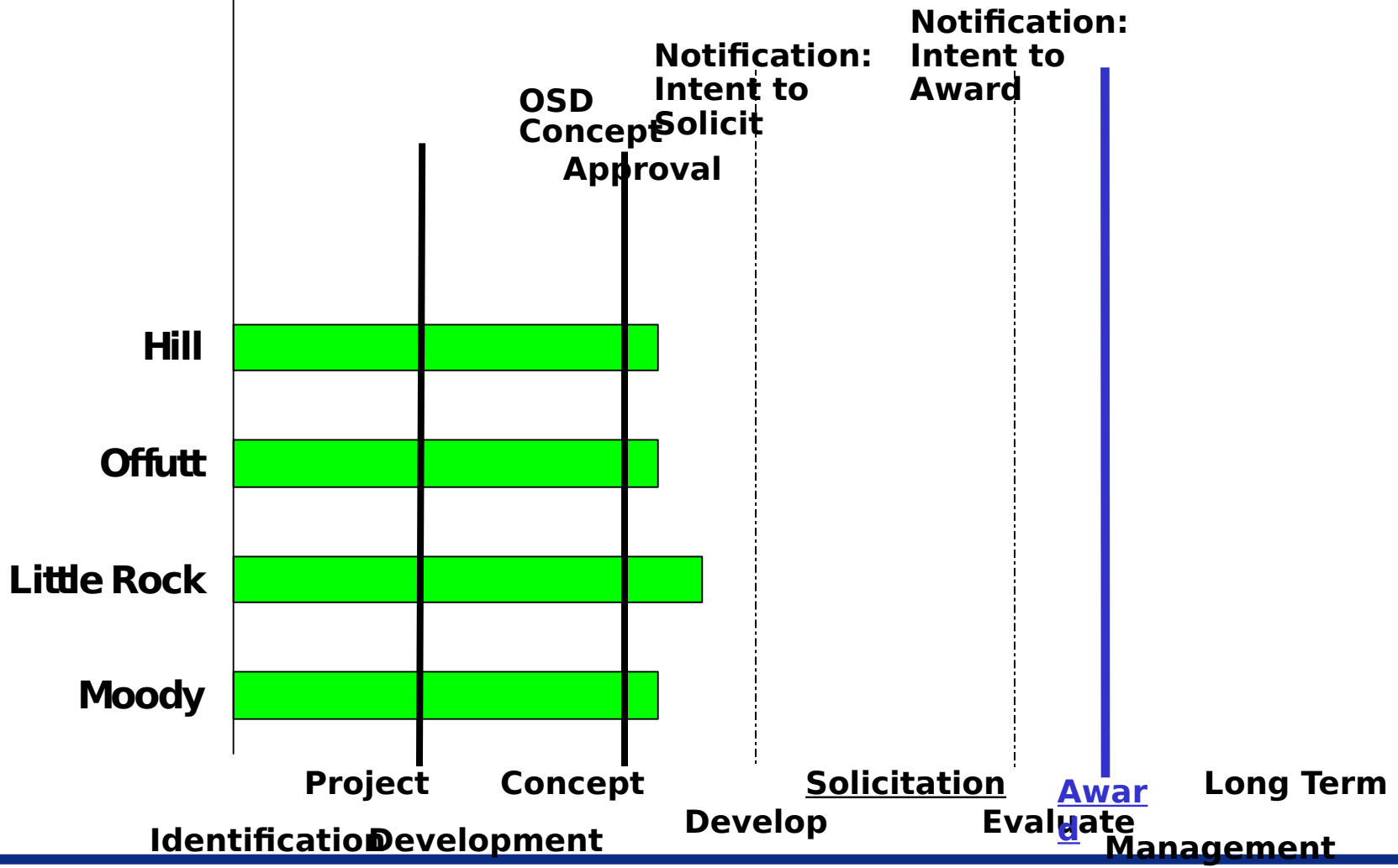
Housing Excellence:
"Pilot" Housing Privatization Candidates



Housing Excellence:
FY01 Housing Privatization Candidates



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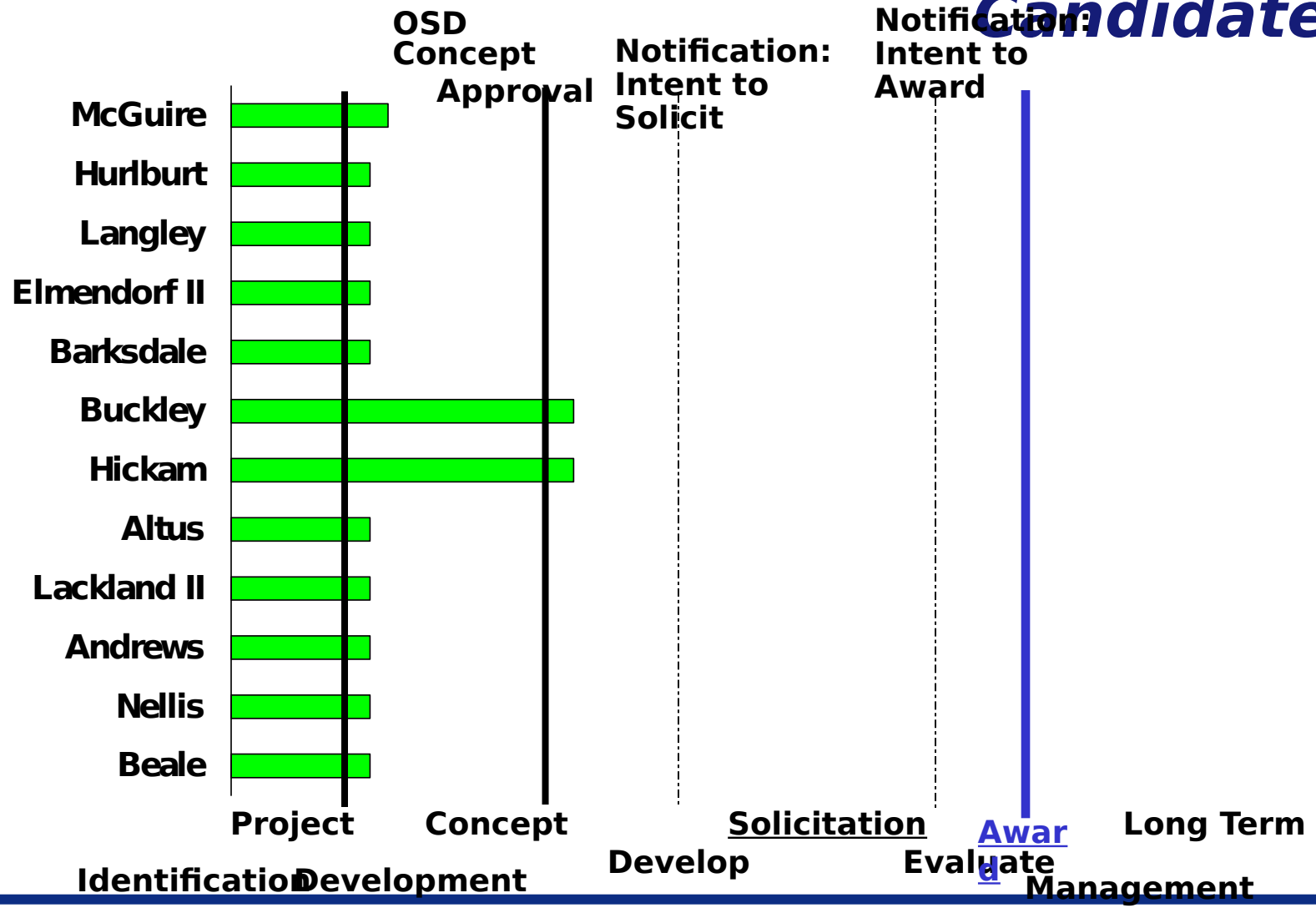
Housing Excellence:
FY02 Housing Privatization Candidates



Contamination at Elmendorf Privatized Housing

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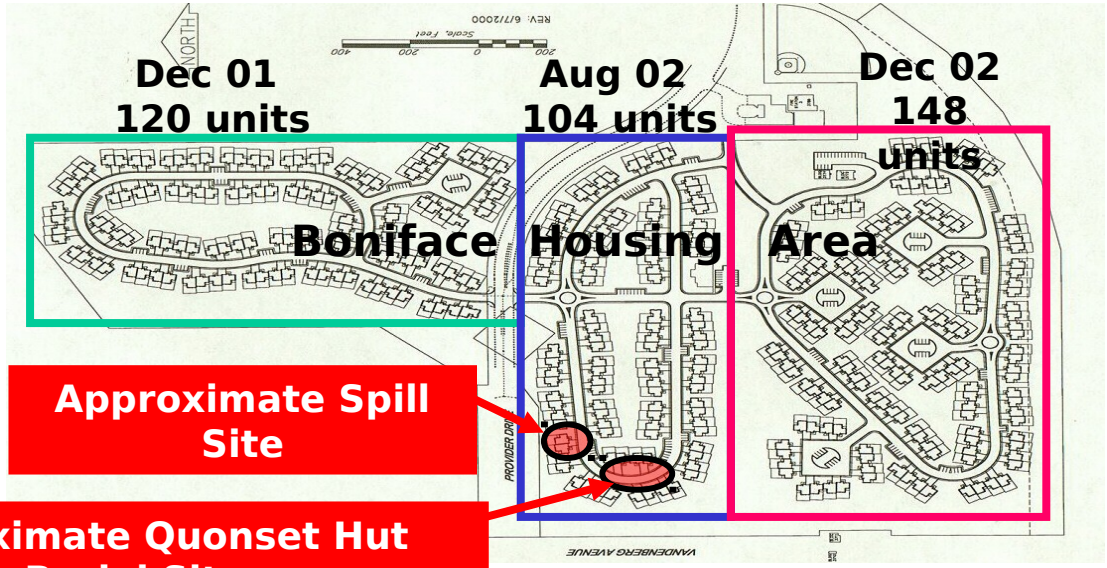
- **Background: Limited sites discovered during excavation**
  - Buried Quonset hut - lead contamination up to 440 mg/kg
  - 4 drums - contained reactive sulfide, low levels of pesticides, mercury, and barium
- **AF responsible for assessment and clean-up**
  - $150K (P714) used by AFCEE for site characterization
  - Site assessment found some diesel, BTEX compounds and limited metal debris
  - Site cleanup has been funded with P-713 at a cost of $1.68M
  - No major impact on schedule



Questions?